LIBRARY
SUPREME COURT, U. S.

FILED
MAY 31 1969
JOHN F. DAVIS, CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1969

No. [redacted] 184

THOMAS W. SULLIVAN,
Petitioner

vs.

BOARD OF COMMISSIONERS OF THE ALABAMA STATE BAR,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

FRED BLANTON, JR., Esq.
Suite 1627
Twenty-One Twenty-One Building
Birmingham, Alabama 35203
Counsel for Petitioner

INDEX

	Page
Opinions below	1-2
Jurisdiction	2
Questions presented for Review	2-3
Constitutional provisions, statutes and rules involved	3
Statement of Case	4-8
Reasons for granting writ	8-22
Conclusion	22-23
Appendix A—opinions and judgments below	A1-A19
Appendix B—Constitution provisions, statutes and rules involved	B1-B3

CITATIONS

CASES:	Page
Aiello v. Aiello, 272 Ala 505, 133 So2d 18	17
Bloom v. Illinois, __US__ (Decided May 20, 1968)	12, 14, 15
Connally v. General Construction Co., 269 US 395	13
Duncan v. Louisiana, __US__ (Decided May 20, 1968)	12
Ex parte Dozier, 262 Ala 197, 77 So2d 903	9
Ex parte Huie, 278 Ala 330, 178 So2d 156	9
Ex parte Messer, 228 Ala 16, 152 So 244	9, 12
Griffith, et al., v. Board of Commissioners, 382 US 988	4
Gwin v. Gwin, 219 Ala 522, 122 So 648	19
Harrison & Saunders v. Harrison, 20 Ala 629, 644	19
Hilley v. Hilley, 275 Ala 617, 157 So2d 215	16, 17
In The Matter of John Ike Griffith, 219 So2d 357 (Ala. 1969)	14
In the Matter of Thomas W. Sullivan, 219 So2d 346 (Ala. 1969)	1
Jennings v. Jennings, 251 Ala 73, 36 So2d 236	15, 19
Levine v. Levine, 262 Ala 491, 80 So2d 235	16
Levy v. Levy, 256 Ala 629, 56 So2d 344	16, 17
Lutsky v. Lutsky, 279 Ala 185, 183 So2d 782	5, 16
Pointer v. Texas, 380 US 400	12
Shapiro v. City of Birmingham, 30 Ala App 1, 10 So2d 38	10
Spevack v. Klein, 385 US 511	8, 12, 22
Sullivan v. Alabama State Bar, etc., et al., SCUS, OT 1968, No. 1170	8
Wilson v. State, 243 Ala 1, 8 So2d 422	9
Zwickler v. Koota, 389 US 241	13

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES:

Uuited States Constitution:

First Amendment 3, 6, 18, 19, 20

Sixth Amendment 2, 3, 10

Fourteenth Amendment 2, 3, 4, 5, 6, 7, 10, 17, 19

Statutes:

Title 28, U.S. Code, Section 1257(3) 2

Title 34, Section 27, Code of Alabama 1940, as amended 5

Title 34, Section 29, Code of Alabama, 1940, as amended 5, 15, 21

Title 46, Section 21, *et seq,* Code of Alabama, 1940, as amended 7

Rules:

Rule 16, Section A, Board of Commissioners of Alabama State Bar 4, 7

Rule 25, Section A, Board of Commissioners of Alabama State Bar 3, 4, 5, 6, 7, 9, 16, 17, 22

Rule 36, Section A, Board of Commissioners of Alabama State Bar 2, 4, 7, 13

Miscellaneous:

Levy, *Origins of the Fifth Amendment* (Oxford Univ. Press, NY, 1968) 20

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No.

THOMAS W. SULLIVAN,

Petitioner

vs.

BOARD OF COMMISSIONERS OF THE ALABAMA STATE BAR,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES.

Your petitioner, THOMAS W. SULLIVAN, respectfully prays that a writ of certiorari be issued out of and under the seal of this Court to review the judgment of the Supreme Court of Alabama rendered on the 30th of January, 1969, which affirmed the disbarment of petitioner by the Board of Commissioners of the Alabama State Bar on the 3rd of March, 1967.

A timely application for rehearing in the Supreme Court of Alabama was denied, without opinion, on the 6th of March, 1969.

OPINIONS BELOW

The opinion of the Supreme Court of Alabama has been reported at 219 So2d 346, under the title: *In the Matter of Thomas W. Sullivan.*

A copy of this opinion is attached hereto in Appendix A, *infra,* pp. A1 thru A17.

JURISDICTION

The judgment of the Supreme Court of Alabama was entered on the 30th of January, 1969, and is annexed hereto in Appendix A, *infra,* p. A18.

A timely petition for rehearing was denied on the 6th of March, 1969, and the judgment of the Supreme Court of Alabama thereon is in Appendix A, p. A19.

The statutory provision believed to confer jurisdiction upon this Court to review the judgment in question is 28 U.S. Code, Sec. 1257(3).

QUESTIONS PRESENTED FOR REVIEW

I

Whether or not a defendant in a state bar disciplinary proceeding, who received the ultimate penalty of disbarment, was tried before a fair and impartial tribunal, consistent with the Sixth and Fourteenth Amendments, United States Constitution, where certain members of that tribunal for determining guilt or innocence had voted previously for adoption of the rule defendant was determined to have violated.

II

Whether or not in a state bar disciplinary proceeding, where the penalty imposed was the ultimate one of disbarment, depositions could be used as evidence against the defendant consistent with the Sixth and Fourteenth Amendments, United States Constitution.

III

Whether Rule 36, Section A, Rules Governing the Conduct of Attorneys in Alabama, which condemns "any conduct unbecoming an attorney at law" and makes an attorney subject to discipline therefor, sufficiently establishes a standard of conduct reasonably ascertainable and definite to afford a constitutional guide or standard for an attorney consistent with the due process clause of the Fourteenth Amendment, United States Constitution.

IV

Whether an attorney in a disciplinary proceeding prosecuted by a state bar association which resulted in his disbarment is entitled to a trial by jury in accordance with the provisions of the Sixth Amendment, United States Constitution, as the same is made applicable to the State of Alabama by operation of the Fourteenth Amendment, United States Constitution.

V

Whether or not an attorney, consistent with the due process and equal protection clauses of the Fourteenth Amendment, United States Constitution, may be proceeded against in a disbarment action where the thrust of the complaint against him is a violation or violations of a rule of conduct of the Board of Commissioners of the Alabama State Bar, approved by the Supreme Court of Alabama, which said rule is *contra* to the interpreted statutory law of the State of Alabama.

VI

Whether or not Rule 25, Section A, as last amended, Rules of the Board of Commissioners of the Alabama State Bar, which rule concerns the granting of divorces in the State of Alabama, is consistent with the freedom of religion clause of the First Amendment, United States Constitution, as the same is made applicable to the State of Alabama by operation of the Fourteenth Amendment, United States Constitution.

VII

Whether or not the procedures regulating disciplinary proceedings in the State of Alabama, wherein the Board of Commissioners of the Alabama State Bar formulates rules, and acts, directly or indirectly, as accuser, prosecutor, judge and jury, are consistent with the due process clause of the Fourteenth Amendment, United States Constitution.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The constitutional provisions, statutes and rules involved are set forth below (Appendix B, *infra,* pp. B1, *et seq.*)

STATEMENT OF THE CASE

This disciplinary proceeding has been in progress formally for almost five years.

On the 30th of June, 1964, the Grievance Committee of the Alabama State Bar filed charges (R. 1 thru 9) against your petitioner alleging violations of Rules 25 and 36, Section A, as last amended, Rules Governing the Conduct of All Persons Admitted to the Practice of Law in the State of Alabama (Appendix B, *infra,* pp. B2 thru B3).

Succinctly stated, Rule 25, Section A, as last amended, proscribes certain conduct by attorneys in the procurement of divorces in the courts of Alabama, with particular emphasis upon the non-residency of both parties to a divorce action. Rule 36, Section A, as last amended, is the vague and general prohibition of "any conduct unbecoming an attorney at law."

This matter was in hiatus while related cases against other individuals involving other points were litigated through the courts of Alabama to this Court. See *Griffith, et al., petitioners, v. Board of Commissioners of the Alabama State Bar,* 382 US 988.

Additional charges against petitioner Sullivan were filed on the 29th of April, 1966 (R. 20 thru 21A). Violations of Rule 16, Section A (Appendix B, *infra,* p. B2) were added. Rule 16 concerns the offering of false or forged testimony in evidence.

On the 13th of June, 1966, petitioner filed his Motion to Dismiss Complaint, As Amended (R. 22 thru 25). *Inter alia,* Sullivan interposed the following federal constitutional objections:

> "5. For that Section A, Rule 36, of the Rules Governing the Conduct of Attorneys in Alabama, which condemns 'any conduct unbecoming an attorney at law' and makes an attorney subject to discipline therefor, fails to establish a standard of conduct reasonably ascertainable and sufficiently definite to afford a constitutional guide or standard for an attorney in violation of Amendment XIV, United States Constitution.

"13. For that the proceeding is void in that it does not provide for a trial by jury of the issues alleged, in violation of the state and federal constitutions.

* * *

"16. For that Rule 25, Section A, as last amended, Board of Commissioners of the Alabama State Bar, is *contra* to the interpreted statutory law of the State of Alabama, particularly Title 34, Sections 27 and 29, Code of Alabama, 1940, and, as a result, said Rule violates the due process clause of Article I, Section 6, Constitution of Alabama, 1901, and the due process and equal protection clauses of Amendment XIV, Constitution of the United States."

An amendment to the foregoing Motion to Dismiss was filed on the 6th of September, 1966 (R. 33 thru 35). *Inter alia,* the ensuing federal constitutional points were raised:

"23. For that Section A, Rule 25, as last amended, is null, void and illegal inasmuch as marriage is a civil contract only, as any other contract, and to require that a party to a divorce, or one of the parties, be a bona fide resident of the State of Alabama is a violation of the due process clauses of the State and federal constitutions and the equal protection clause of Amendment XIV, Constitution of the United States.

* * *

"25. For that Section A, Rule 25, as last amended, is null, void and illegal in that the Supreme Court of Alabama has on a recent occasion in *Lutsky v. Lutsky,* 183 So2d 782 (March 3, 1966), held that even though neither party to a divorce was domiciled in the State of Alabama it would not disturb the decree, thus creating such uncertainty in the law of divorce in Alabama as to cause said rule to violate the rights of defendant guaranteed by the due process clauses of the state and federal constitutions and the equal protection clauses of Amendment XIV, Constitution of the United States.

"27. For that Section A, Rule 25, as last amended, is null, illegal and void inasmuch as marriage is a civil

contract only, as any other contract, and to require that the parties to a divorce, or one of the parties, be a bona fide resident of the State of Alabama when both parties are before the court, which court has jurisdiction of the subject matter is a violation of Amendment I to the Constitution of the United States as the same is made applicable to the State of Alabama by operation of the XIVth Amendment to the Constitution of the United States."

Also, on the 6th of September, 1966, Sullivan filed a Motion to Suppress Depositions (R. 54), which contained the following ground, among others:

"3. For that this proceeding is quasi-criminal and highly judicial and to permit the use of a deposition without the consent of the defendant violates his right of confrontation guaranteed by Amendment VI, Constitution of the United States, as the same is made applicable to the State of Alabama by the operation of Amendment XIV, Constitution of the United States."

In addition, Sullivan, on or about the 12th of February, 1967, filed his motion to suppress all evidence taken by deposition in this matter, with the exception of the deposition of John B. Scott, secretary-treasurer, Alabama State Bar, which was taken at defendant's request. All evidence for the prosecution was taken outside the presence of the Board of Commissioners of the Alabama State Bar, which determined his guilt or innocence. The federal constitutional grounds were specifically spelled out, and followed that delineated above in the Motion to Suppress Depositions of the 6th of September, 1966.

In the meanwhile, petitioner was charged with additional violations of Rule 36, Section A, on the 14th of November, 1966 (R. 228 thru 234), to which he re-filed all his previous objections.

The record reveals that Rule 25, Section A, was amended on the 20th of July, 1961, to its present reading (R. 196-197). The guilt or innocence of Sullivan on a charge or charges of violations involving, among others, Rule 25, was determined by a meeting of the Board of Commissioners of

the Alabama State Bar on the 3rd of March, 1967 (R. 339, *et seq.*). Messrs. Walker, Blackburn, McQueen, Brantley, Hill, McCord, Carnes, and McDonnell were present on the 20th of July, 1961, and also on the 3rd of March, 1967. Exception on Fourteenth Amendment grounds to such a procedure was taken by filing Objections to Certain Members of Board of Commissioners of the Alabama State Bar.

The Board of Commissioners is the governing body of the integrated Alabama State Bar. Title 46, Section 21, *et seq.*, Code of Alabama, 1940, as amended. By Title 46, Section 25, Code of Alabama, 1940, the Board is given broad powers to formulate rules governing the conduct of attorneys in Alabama, such rules being subject to the approval of the Supreme Court of Alabama; it investigates complaints made against attorneys; it appoints a committee (Grievance Committee) to take evidence against the charged attorney, which evidence is transmitted to the Board; the Board then sits as a judge and acts as a jury in the disciplinary matter; and the case is prosecuted by the aforesaid Grievance Committee and the general counsel of the Alabama State Bar, who is appointed by the Board of Commissioners (R. 339, *et seq.*).

Petitioner, at the first opportunity, on the 6th of September, 1966, interposed the following objection:

> "MR. BLANTON: I would make a further objection to the entire proceeding in that there are no rules which are intelligible covering these proceedings by the Alabama State Bar Board of Commissioners and that in view of that indefiniteness that the defendant, Thomas W. Sullivan, is denied due process under Article I, Section 6, Constitution of Alabama, and Amendment XIV, Constitution of the United States."

The Board found petitioner guilty of Charges FIVE (Rule 25, Section A-Ruggerio-R. 20); SIX (Rule 16, Section A-Ruggerio-R. 21); SEVEN (Rule 36, Section A-Ruggerio-R. 21A); and NINE (Rule 36, Section A-Nichols-R. 231-232). The punishment assessed was disbarment as to each charge separately and severally (R. 346).

A petition for review of this judgment of disbarment was duly heard by the Supreme Court of Alabama, and a decision affirming the disbarment was rendered on the 30th of January, 1969. Timely application for rehearing was denied on the 6th of March, 1969.

REASONS FOR GRANTING THE WRIT

INTRODUCTION

This Court has had before it previously one aspect of this disciplinary proceeding against petitioner. *Sullivan v. Alabama State Bar, etc., et al.,* October Term, 1968, No. 1170. There it was the decision of the Court, through affirmance rendered on April 28, 1969, that the Alabama State Bar and its Board of Commissioners were not within the "one-man, one-vote" doctrine applicable to governmental subdivisions possessed of greater legislative powers. No further point is made here of this facet on the merits.

Nonetheless, petitioner raised, and he believes properly and timely, other objections based upon his rights as a first class citizen of the United States entitled to each and every federal constitutional right when prosecuted by the Alabama State Bar for violation of rules of conduct.

The penalty—disbarment—was severe, perhaps more so in some respects than imprisonment in the penitentiary. There are within the jurisdiction of this Court more than 50 bar associations which, in one procedural method or another, either prosecute attorneys for violations of rules of conduct before judicial tribunals, or themselves impose punishment upon erring members, though Alabama is believed to be only state which approves disbarment by a bar association.

No case has been found where this Court, with certain exceptions on a very specific and limited point, *e.g., Spevack v. Klein,* 385 US 511, has considered the broader ramifications of the impact of the United States Constitution on state bar disciplinary procedures. In an era which has emphazied individual liberties guaranteed by the United States Constitution, it is submitted an examination of the constitutional rights of a lawyer *vis-a-vis* the organization which prosecutes him is of national importance.

I

WHETHER OR NOT A DEFENDANT IN A STATE BAR DISCIPLINARY PROCEEDING, WHO RECEIVED THE ULTIMATE PENALTY OF DISBARMENT, WAS TRIED BEFORE A FAIR AND IMPARTIAL TRIBUNAL, CONSISTENT WITH THE SIXTH AND FOURTEENTH AMENDMENTS, UNITED STATES CONSTITUTION, WHERE CERTAIN MEMBERS OF THAT TRIBUNAL FOR DETERMINING GUILT OR INNOCENCE HAD VOTED PREVIOUSLY FOR ADOPTION OF THE RULE DEFENDANT WAS DETERMINED TO HAVE VIOLATED.

One function of the Board of Commissioners of the Alabama State Bar is to determine the facts allegedly tending to demonstrate the guilt of defendant. *Arguendo,* the Board must be considered the petit jury. (It is also, *arguendo,* the grand jury). Petitioner was a defendant, see Ex parte *Dozier,* 262 Ala 197, 77 So2d 903, in a quasi-criminal and highly judicial trial. See Ex parte *Messer,* 228 Ala 16, 152 So 244, quoted with approval in Ex parte *Huie,* 278 Ala 330, 178 So2d 156.

The Board of Commissioners formulated the rule under which petitioner was prosecuted actually, if not specifically, *i.e.,* Rule 25, Section A, as amended. The Supreme Court of Alabama has recognized that in criminal trials great care should be exercised to preserve to accused his constitutional rights to a fair trial by an impartial jury, and that in such cases any doubt as to the competence of a juror should be resolved in favor of a defendant. See *Wilson v. State,* 243 Ala 1, 8 So2d 422.

In the present case the Supreme Court of Alabama stated as follows:

> "Assignment of Error III presents the question of the qualification of some eight members of the Board of Commissioners to sit in the present proceedings since they were members of the Board in 1961, at the time when Rule 25, Section A, as amended, was formulated by the Board of Commissioners.
>
> "A judge is not disqualified to try a case because he had been a member of the legislature enacting a statute in-

volved in litigation before him, *Norton v. Lyon Van and Storage Co.,* 9 Cal. App. 2d 199, nor does the fact that a prospective juror favors a statute, afford evidence that such juror is biased against a person accused of violating such statute. *State v. Sullivan,* 97 Wash. 639, 166 P. 1123. See also *48 C.J.S., Judges, Sec. 82,* and *50 C.J.S. Juries,* Sec. 244. By analogy those members of the Board who were also members at the time Rule 25, Section A was formulated, were not, for that reason, disqualified to sit in the present proceedings." (Appendix A, *infra,* p. A9).

The conclusion is inescapable that the Supreme Court of Alabama has placed defendant attorneys in a special category quite different from other defendants, even those prosecuted in so-called quasi-criminal matters. For instance, it has been held in Alabama that a person is disqualified to sit as a juror where it is his duty to enforce the laws of a city, the violation of such a law being the subject matter of the prosecution. *Shapiro v. City of Birmingham,* 30 Ala App 1, 10 So2d 38.

Thus, considering the sitting of the Board of Commissioners of the Alabama State Bar on the 3rd of March, 1967, as tantamount to the deliberations of a petit jury, then it is evident petitioner Sullivan was denied that fair and impartial tribunal for the determination of his guilt or innocence guaranteed by the Sixth Amendment, United States Constitution, as the same is made applicable to the State of Alabama by operation of the Fourteenth Amendment, United States Constitution.

II

WHETHER OR NOT IN A STATE BAR DISCIPLINARY PROCEEDING, WHERE THE PENALTY IMPOSED WAS THE ULTIMATE ONE OF DISBARMENT, DEPOSITIONS COULD BE USED AS EVIDENCE AGAINST THE DEFENDANT CONSISTENT WITH THE SIXTH AND FOURTEENTH AMENDMENT, UNITED STATES CONSTITUTION

Every shred of evidence against petitioner was brought before the Board of Commissioners on the 3rd of March, 1967, by means of depositions, affidavits or other proceedings held outside the presence of the several commissioners.

The Supreme Court of Alabama commented on the objection interposed to such evidence, thusly:

"Assignment of error V asserts error because of the action of the Board of Commissioners in denying petitioner's motion to suppress the deposition of Jean Ruggerio.

* * *

"On 3 June, 1966, a due and proper notice was sent to counsel for petitioner by registered mail that the deposition of Jean Ruggerio would be taken at a specified time and place on 23 June 1966, in Berkeley Heights, New Jersey, before an officer authorized to administer oaths by the laws of New Jersey, for the purpose of discovery or for use as evidence.

"The deposition was duly taken in accordance with the notice. The petitioner made no appearance, either by writing, by counsel, or in person.

"Section 25 of Title 46, Code of Alabama, 1940, found in Article 1 of said Title relating to the organization of the Bar of Alabama, provides that:

'***the evidence of witnesses residing outside such county (county of residence of charged attorney) may be taken in the same manner as provided by law for the taking of depositions in civil cases." (Par. and Underlining ours.)

* * *

"This argument is succinctly answered by the following quotation from *Ex parte Messer,* 228 Ala. 16, 152 So. 244, a disbarment proceedings:

'It is well settled that the rules and principles of the law of evidence applicable to civil proceedings are also applicable to *quasi criminal proceedings;* that the defendant may be compelled to testify as a witness for the plaintiff, the testimony may be taken by deposition, and the failure of the defendant to testify may be commented on in argument. Smith v. State, 13 Ala. App. 411, 69 So. 406; Miller v. State, 110 Ala. 69, 20 So. 392; Attorney General v. Pelletier, 240 Mass. 264, 134 N.E. 407.' (Appendix A, *infra,* pp. A10 thru A11).

The validity of most parts of the foregoing quotation

from *Messer* has been placed in limbo by such cases as *Spevack v. Klein,* 385 US 511. And characterization of a disbarment proceeding as quasi-criminal or *sui generis* cannot circumvent the applicability of federal constitutional standards. Compare *Bloom v Illinois,* __ US __ (Decided May 20, 1968) (Contempt proceeding).

Thus, it is the position of petitioner that he was not confronted with the witnesses against him *in the tribunal which adjudicated his guilt.* See *Pointer v. Texas,* 380 US 400. To cast upon a defendant, as in this case, the burden of traveling from Alabama to New Jersey, with his counsel, to enjoy his constitutional right of confrontation is patently a denial of the right by indirection, especially if the contention be advanced that this was his opportunity to enjoy the right, and by not so exercising it in New Jersey it was waived.

Casting aside the labeling of disbarment proceedings as being quasi-criminal, the core of the matter is that disbarment is a severe *punishment.* In this context, then the Sixth Amendment right to confrontation cannot be sidetracked while the prosecution proceeds full throttle on the main line to conviction. While the public must be protected from unethical attorneys, as it must be protected from criminals, nonetheless, where the punishment is of great magnitude, then federal constitutional standards of right should be applied. Compare *Duncan v. Louisiana,* __ US __, (Decided May 20, 1968.)

III

WHETHER RULE 36, SECTION A, RULES GOVERNING THE CONDUCT OF ATTORNEYS IN ALABAMA, WHICH CONDEMNS "ANY CONDUCT UNBECOMING AN ATTORNEY AT LAW" AND MAKES AN ATTORNEY SUBJECT TO DISCIPLINE THEREFOR, SUFFICIENTLY ESTABLISHES A STANDARD OF CONDUCT REASONABLY ASCERTAINABLE AND DEFINITE TO AFFORD A CONSTITUTIONAL GUIDE OR STANDARD FOR AN ATTORNEY CONSISTENT WITH THE FOURTEENTH AMENDMENT, UNITED STATES CONSTITUTION

Petitioner challenged the validity of Rule 36, Section A, for vagueness and argued this in brief. As was stated by the

Court in *Connally v. General Construction Co.*, 269 US 385, 391, it is a rule "which forbids ***the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." Contrast *Zwickler v. Koota*, 389 US 241.

Thus, what may be considered by one attorney to be conduct unbecoming an attorney would not be so construed by another. Does "conduct unbecoming an attorney" encompass the personal life of an attorney? The mores of a community certainly offers no ascertainable standard which is definite, since, even within a state, community moral standards may differ widely. What might be considered conduct unbecoming an attorney in a rural community might be acceptable practice in an urban community.

Nonetheless, over objection, the Board of Commissioners found petitioner guilty on two charges involving Rule 36, *i.e.*, Seven and Nine.

Sullivan submits that since a severe *punishment* was imposed, and was capable of being imposed from the outset of this disciplinary proceeding, that federal constitutional standards of definiteness must be met as though the matter were strictly criminal. And this conclusion must still be reached even though these two charges did supply elements of specificity.

IV

WHETHER AN ATTORNEY IN A DISCIPLINARY PROCEEDING PROSECUTED BY A STATE BAR ASSOCIATION WHICH RESULTED IN HIS DISBARMENT IS ENTITLED TO A TRIAL BY JURY IN ACCORDANCE WITH THE PROVISIONS OF THE SIXTH AMENDMENT, UNITED STATES CONSTITUTION, AS THE SAME IS MADE APPLICABLE TO THE STATE OF ALABAMA BY OPERATION OF THE FOURTEENTH AMENDMENT, UNITED STATES CONSTITUTION

Petitioner interposed the objection that the proceedings against him were void because a trial by jury was not provided for in the statutes concerning disciplinary proceedings.

The Supreme Court of Alabama in its latest pronouncement on a trial by jury in disciplinary matters concerning attorneys stated in *In the Matter of John Ike Griffith*, 219 So2d 357 (Ala. 1969) (Decided February 6, 1969, rehearing denied March 6, 1969), as follows:

> "Petitioner strongly insists that he was entitled to a trial by jury. The question of whether an attorney is entitled to trial by jury in disbarment proceedings has been voluminously researched and argued in jurisdictions throughout the country. This court examined and discussed the question in detail in *Thompson,* supra (228 Ala 113, 152 So 229), where it was held:
>
> > '***(T)hat the courts have the inherent power to suspend or to remove attorneys without trial by jury.***'
>
> "That proposition has been consistently followed in this jurisdiction and in other jurisdictions. Although petitioner urges us to reverse *Thompson,* supra, we reaffirm our adherence to the principle that courts have inherent power to suspend or remove attorneys without trial by jury in order to protect the dignity of the court, and maintain the respect of the public for our legal system. We, therefore, find no error in the refusal to grant petitioner a trial by jury."

Sullivan consistently has denominated disbarment as a severe *punishment*. A disbarment does protect the dignity of the court, but a conviction for contempt is of the same stripe. A severe *punishment* for contempt falls within the ambit of a constitutionally protected right to trial by jury. See *Bloom v. Illinois,* __ US __ (Decided May 20, 1968). The attorney undertaking his defense of charges which could, and in this case did, result in disbarment, should likewise be cloaked with the protection of a trial by jury. The power of a court to punish for contempt or to suspend or disbar an attorney for offenses committed in its presence is outside the scope of this discussion. The present charges concerned alleged violations committed outside the presence of any court or any organization or tribunal sitting to determine guilt or innocence.

Petitioner submits there is no constitutional difference between a situation involving out-of-court contempt and out-of-court violations of ethical standards and that, as a result, he should, of right, be entitled to a trial by jury. That past procedures are not sacrosanct when the inherent power of a court is involved is amply illustrated in *Bloom, supra.* Denominating proceedings as *sui generis,* or otherwise, to avoid constitutional limitations is to no avail.

V

WHETHER OR NOT AN ATTORNEY, CONSISTENT WITH THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT, UNITED STATES CONSTITUTION, MAY BE PROCEEDED AGAINST IN A DISBARMENT ACTION WHERE THE THRUST OF THE COMPLAINT AGAINST HIM IS A VIOLATION OR VIOLATIONS OF A RULE OF CONDUCT OF THE BOARD OF COMMISSIONERS OF THE ALABAMA STATE BAR, APPROVED BY THE SUPREME COURT OF ALABAMA, WHICH SAID RULE IS *CONTRA* TO THE INTERPRETED STATUTORY LAW OF ALABAMA

Title 34, Section 29, Code of Alabama, 1940, as amended, is as follows:

> "Sec. 29. *If defendant a non-resident, a year's residence by plaintiff must be proved.* When the defendant is a non-resident, the other party to the marriage must have been a bona fide resident of this state for one year next before the filing of the bill, which must be alleged in the bill and proved; provided, however, the provisions of this section shall not be of force and effect when the court has jurisdiction of both parties to the cause of action."

According to *Jennings v. Jennings,* 251 Ala 73, 36 So2d 236, there is no jurisdiction over the subject matter in a *nisi prius* court to grant a divorce unless one party to the action be domiciled in Alabama. Hence, *arguendo,* the *proviso* in the foregoing statute is null and void.

Therefore, it follows that any decree entered by a court where both parties are non-residents would be null and void. Yet, in case after case, the Supreme Court of Alabama has upheld non-resident divorces on grounds of "laches" or "estoppel," *e.g., Levine v. Levine,* 262 Ala 491, 80 So2d 235; *Lutsky v. Lutsky,* 279 Ala 185, 183 So2d 782. Thus, where there is laches or estoppel, the end result is a valid final decree of divorce.

Until an action to set aside a decree is filed and heard, it is impossible to state with assurance a divorce decree where both parties are non-residents is null and void. On the contrary, the presumption must be that such divorce decrees are valid and binding until an action to set aside is decided adversely to the decree. Rule 25, Section A, as amended, causes the obtaining by an attorney of basically legal results to be denominated unethical.

In *Ruggerio,* involved in Charges Five, Six and Seven in the instant case, there was oral testimony before the register (R. 170-171) wherein complainant stated "I***am a bona fide resident of the State of Alabama, residing at 100 Commerce Street, Montgomery, Alabama." There was no appeal from the acceptance by the trial court of this testimony as being sufficient to prove domicile in Alabama. In *Levy v. Levy,* 256 Ala 629, 56 So2d 344, the trial judge, acting upon statements similar to those in *Ruggerio,* found "the evidence is not sufficient to satisfy the court of the truth in fact of complainant's domicile in this state," and reached the conclusion "the court has no jurisdiction over the subject matter."

In *Ruggerio,* it is patent the trial court had been satisfied such statements were sufficient to establish domicile of complainant, even though from the standpoint of *Levy* the trial court might have been in error. This error is correctable on appeal. See *Hilley v. Hilley,* 275 Ala 617, 157 So2d 215.

Thus, the error, if error it be, of the trial court in pursuing this course of action is being visited upon the attorney.

The Supreme Court of Alabama answered this argument thusly:

"The fallacy of this argument is that Rule 25, Section A in no way departs from the applicable divorce statutes

> as to jurisdiction, nor the decisions thereunder, but reinforces these principles. Rule 25, Section A, as amended, was formulated by the Bar, and approved by this court in an effort to eliminate, or lessen, the scandalous 'quickie divorce' racket with its local and national ramifications. It is an effort to regulate the ethical conduct of attorneys, and the validity or invalidity of a divorce decree, or the operation of laches or estoppel is beside the point. We find no merit in this contention."

Petitioner, to the contrary, is of the considered opinion that the crux of the matter is otherwise: Can what is legal and valid be cast in the mold of unethical conduct so that an attorney who obtains legal and valid results be proceeded against and disbarred? While some may consider that the so-called "quickie divorce racket" produced a national scandal as regards Alabama and properly should be eliminated, the ultimate question is whether or not the solution comports with the due process and equal protection clauses of the Fourteenth Amendment, United States Constitution.

No particular or specific period of residence in Alabama is required of a complainant in a divorce action where the respondent is a non-resident when the court has jurisdiction of both parties to the cause of action, the only jurisdictional requirement being that complainant be *domiciled* in the state so as to confer upon the court jurisdiction of the *res.* See *Levy, supra; Hilley, supra.* Hence, the Supreme Court of Alabama has refused to set aside a divorce decree where one of the parties thereto objected. *Aiello v. Aiello,* 272 Ala 505, 133 So2d 18.

Rule 25, Section A, as amended, is, therefore, causing conduct of an attorney in procuring divorces, unless he be able to probe the mental processes of his client and ascertain his true intention as to future permanent residence in the State of Alabama, to be denominated unethical and subjecting himself to disbarment, although the divorce decree obtained be valid for all intents and purposes under the pertinent statutes. Petitioner submits this clearly violates his rights guaranteed by the due process and equal protection clauses of the Fourteenth Amendment, United States Constitution.

VI

WHETHER OR NOT RULE 25, SECTION A, AS LAST AMENDED, RULES OF THE BOARD OF COMMISSIONERS OF THE ALABAMA STATE BAR, WHICH RULE CONCERNS THE GRANTING OF DIVORCES IN THE STATE OF ALABAMA, IS CONSISTENT WITH THE FREEDOM OF RELIGION CLAUSE OF THE FIRST AMENDMENT, UNITED STATES CONSTITUTION, AS THE SAME IS MADE APPLICABLE TO THE STATE OF ALABAMA BY OPERATION OF THE FOURTEENTH AMENDMENT, UNITED STATES CONSTITUTION

Until the reign of Henry VIII, England was Roman Catholic, and, hence, marriage was regarded by the church as a sacrament, and, therefore, indissoluble. Matrimonial causes lodged in ecclesiastical courts, which had power to grant a divorce *mensa et thoro.* Such a divorce might be had by either husband or wife, when the gross misconduct of the other spouse, such as adultery or cruelty, rendered it impossible for them to live together. The judicial separation was had only on the strictest proof of the act charged, and it had to be established firmly the parties were not colluding to escape their marital obligations, the complaining party was free from guilt, and the offense had not been condoned. Basically, these are yet the requirements in Alabama for the obtaining of a divorce.

Ecclesiastical courts also entered decrees of nullity because of some lack of capacity which caused the marriage to be void *ab initio.* But it is emphasized jurisdiction of divorce remained in church courts even after Henry VIII and the break of England from the ties of the Pope of Rome. In fact, these courts retained their matrimonial jurisdiction until the middle of the 19th century, 1857, when a Court of Divorce and Matrimonial Causes was created.

In the United States there were no ecclesiastical courts, and American courts of equity did not regard themselves as having jurisdiction in divorce matters, until such jurisdiction was conferred by statute.

In a word, our Anglo-Saxon heritage in the field of divorce is deeply rooted in that amalgamation of church and

state extant in England. In fact, the Supreme Court of Alabama has stated that marriage is the most sacred of all the domestic relations which obtain among the citizens of Alabama. See *Harrison and Saunders v. Harrison,* 20 Ala 629, 644, quoted with approval in *Jennings v. Jennings, supra,* as a compelling reason courts of one state will not divorce citizens of another state. Yet, oddly, that same sacred marriage, in whatever state performed, may be annulled with impunity in Alabama, see *Gwin v. Gwin,* 219 Ala 522, 122 So 648, although the rationale is there was never any marriage.

Recently, the London *Daily Express* reported on a White Paper of a Law Commission dealing with divorce in England. Consideration, it was stated, was being given to divorce by consent, *i.e.,* marriage is a civil contract which may be dissolved as any other contract.

To the point, the historical background of divorce established the religious overtones. By reasoning that the state has an interest in the marriage, the court merely continues in other terms the interest of the church in marriage. This, defendant submits, is but the imposition of a religion by a state. The First Amendment, as drawn into the Fourteenth Amendment, United States Constitution, forbids such results.

The Supreme Court of Alabama had this to say regarding this argument:

> "Counsel also contends that by recognizing the state's interest in divorce matters, the courts are thereby merely continuing the interest of some religious views as to the indissolubility of marriage, thereby imposing religious views in the form of law, in violation of the First Amendment of the United State Constitution.
>
> "The fact that society as a whole, and religions, may both have interests in the continuation of marriages by no means violates any provision for the separation of church and state.
>
> "The interest of the church is basically an interest in the sanctity of marriage as a holy bond, while the interest of the state is basically materialistic, i.e., support of the wife and children and not casting them upon society

for support, though admittedly many decisions in passing recognize the spiritual aspects of the marriage bond." (Appendix A, *infra,* p. A14).

Petitioner would only add in rebuttal to this conclusion by the Supreme Court of Alabama that actually the proposition advanced is that marriage is merely a civil contract, and should be treated as such, *i.e.,* where two adult parties are before a court with plenary jurisdiction then the contract should be dissolved if that is the desire of the parties, and it matters not from what state those parties might be, since they should be free, constitutionally, to travel to Alabama and dispatch their business as best they see fit.

VII

WHETHER OR NOT THE PROCEDURES REGULATING DISCIPLINARY PROCEEDINGS IN THE STATE OF ALABAMA, WHEREIN THE BOARD OF COMMISSIONERS OF THE ALABAMA STATE BAR FORMULATES RULES, AND ACTS, DIRECTLY OR INDIRECTLY, AS ACCUSER, PROSECUTOR, JUDGE AND JURY, ARE CONSISTENT WITH THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT, UNITED STATES CONSTITUTION

Leonard Levy in his 1968 book, *Origins of the Fifth Amendment,* describes in minute detail the machinations of the High Commission in England during the later part of the Sixteenth Century.

It is quite striking in how many details the procedures utilized by the High Commission in ferreting out and convicting heretics are reflected in the procedures utilized in this case by the Board of Commissioners of the Alabama State Bar to assure the disbarment of an attorney.

Some years ago the Board of Commissioners of the Alabama State Bar concluded, patently, that divorce lawyers utilizing Title 34, Section 29, Code of Alabama, 1940, as amended, *supra,* were undermining the State by damaging its image. Accordingly, Rule 25, Section A, was amended, and when some attorneys continued to utilize the section on, among other bases, their considered legal opinion that the rule was invalid, the Alabama State Bar sent its investi-

gators into the precincts to ferret out the offenders. One of those ferrets was Maultsby Waller, who turned up in this case as the commissioner appointed by the president of the Bar to take testimony! (R. 294 thru 301)

The Grievance Committee, appointed by the Board of Commissioners, then undertook to go hither and yon in and out of the State of Alabama to take testimony. After all this was done, though petitioner had made many objections as the record discloses, the results were collected into a neat bundle and deposited with each commissioner. Petitioner was completely in the dark as to the merits of any of his many motions, objections, etc., until *AFTER* the so-called hearing in Montgomery, Alabama, before the Board of Commissioners on the 3rd of March, 1967 (R. 339-340), *when they were summarily overruled.* The Board of Commissioners was then acting as a judge in relation to the legal matters presented.

A representative of the Board-appointed Grievance Committee together with the Board-appointed general counsel of the Alabama State Bar prosecuted defendant on the 3rd of March, 1967.

Then, without hearing or having an opportunity to study the demeanor of any witness for the prosecution, the Board proceeded to sit as a petit jury and determined the facts in the case, reaching a conclusion of guilt on Charges Five, Six, Seven, and Nine.

Furthermore, the Grievance Committee repeatedly attempted to question the defendant, which maneuver was resisted strenuously at every turn since it was the firm belief of defendant that attorneys do have constitutional rights as other citizens. This position was vindicated when *Spevack v. Klein, supra,* was decided. And it must be admitted that in the face of *Spevack,* Charge Eight involving the refusals to answer questions was withdrawn.

Nonetheless, the totality of the circumstances surrounding the present proceeding, as amply revealed by the entire record, shrieks with unfairness. *EVERY FACET WAS UNDER THE CONTROL OF THE BOARD OF COMMISSIONERS OF THE STATE BAR FROM THE FORMULATION OF RULE 25, SECTION A, AS*

AMENDED, TO CONVICTION. And, notwithstanding the decision of this Court in *Sullivan v. Alabama State Bar, etc., supra,* the Board of Commissioners did not fairly represent the lawyers of the State of Alabama.

It is well and good that lawyers keep their own house in order! However, petitioner is entitled to full constitutional rights in his position as a defendant in a proceeding which could, and did, inflict a punishment. In a society which spends millions of dollars to see that one self-admitted murderer receives justice through a fair trial, it is indeed awkward and embarrassing that lawyers, so zealous in their pleas for others, cannot afford one of their own the ultimate in Fourteenth Amendment due process!

This matter will have run its course on the determination of this petition, now in the conscience of the Court. The questions are quite simple: Do we, as lawyers, in the Twentieth Century sanction procedural methods which hark back four hundred years? Has two hundred years of constitutional government not taught us that everyone, even a lawyer, is entitled to the protection of the safeguards of the federal constitution? Are we, as lawyers, to endorse a procedure which reeks of the noxious odor of the High Commission of the Sixteenth Century?

CONCLUSION

For the reasons stated, and admittedly somewhat at length, the petition for writ of certiorari in this case should be granted in order that the case can be fully briefed on the merits of the questions presented so the lawyers under the jurisdiction of this Court in the several states, the District of Columbia, the territories and possessions, may be fully informed of their constitutional rights as lawyers.

Respectfully submitted,

FRED BLANTON, JR., Esq.
Suite 1627
Twenty-One Twenty-One Building
Birmingham, Alabama 35203

Counsel for Petitioner